FOR ARGUMENT

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No. 95-719

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

- v. -

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE, THE CITY OF NEW YORK

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FEDERAL CASES:

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STATE CASES:

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N.Y. Civ. Prac. L. & R.
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Ostrom, Rottman and Hanson,
"*What are Tort Awards Really Like? The Untold Story from the State Courts*",
14 Law and Policy, p. 77 (1992) 4

C. Wright, Law of Federal Courts,
(5th ed. 1994) 16

OTHER:

Annual Report 1995,
New York City Law Department,
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Governor Cuomo's Approval Memorandum
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Insuring Our Future, Report of the
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BRIEF FOR AMICUS CURIAE, THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of affirmance of the decision and judgment of the United States Court of Appeals for the Second Circuit, dated and entered September 12, 1995. In that decision, the Court of Appeals reversed a judgment of the United States District Court for the Southern District of New York (Brieant, J.), after a jury trial, awarding damages against defendant-respondent, The Center for Humanities, Inc., in the amount of $450,000 for the loss of

300 slide transparencies belonging to plaintiff-petitioner William Gasperini, and remanded for a new trial on the issue of damages, unless Gasperini agreed to remit all damages in excess of $100,000 (Pet. App. 1a-10a). *See Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427 (2d Cir. 1995), *cert. granted*, __ U.S. __, 116 S.Ct. 805 (1996). In concluding that the jury's award was excessive given Gasperini's failure to make an effective showing that all of the lost transparencies were unique and the strong evidence of his limited earning power as a photographer, the Court of Appeals noted that "the object of tort damages is to do what can be done to make an injured party whole; it is not meant to be a winning lottery ticket" or a "financial windfall." *Id.* at 429.

Applying the principles articulated in *Consorti v. Armstrong World Indus.*, 64 F.3d 781 (2d Cir. 1995)(withdrawn), *superseded by*, 72 F.3d 1003, 1009-1013 (2d Cir. 1995), *pet. for cert. pending* (U.S. 95-___), that when New York substantive law governs a diversity case, the federal court looks to New York decisions for guidance on the issue of excessiveness of damages, the Court's review of relevant New York law on lost transparencies further supported its conclusion that the jury's award was excessive. *Id.* at 430. The Court applied New York law governing the standard for appellate review of itemized jury verdicts, *see* N.Y. Civ. Prac. L. & R., § 5501(c), which provides that the Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." *Id.* at 430. Although recognizing that this standard accords less deference to the jury's award than the traditional "shock the [judicial] conscience" standard, the Court found that because this is a diversity case, it was "bound to follow the standard set forth in the New York statute." *Id.*, citing *Consorti*, 64 F.3d at 789-790.

The City has a strong interest in this Court sustaining federal appellate review and the application of N.Y. Civ. Prac. L. & R., § 5501(c), in diversity cases. Unlike the State of New York, which has Eleventh Amendment immunity in federal court and exclusive non-jury state Court of Claims jurisdiction as to claims for monetary damages, municipalities, such as the City, have no sovereign immunity, *see* N.Y. Ct. of Claims Act, § 8, and must rely on appellate review of jury verdicts to help rein in excessive awards. Moreover, the City is self-insured and pays judgments from a budget allocation for that purpose.[1]

The effects of spiralling tort jury verdicts relate directly to the City's ability to provide vital public services, especially because the demands for such services and associated regional costs are uniquely high. The City has an overwhelming interest in preventing the award of judgments which are grossly disproportionate to the injuries suffered, thereby eliminating open-ended financial exposure, saving taxpayer dollars, and freeing up judicial and other litigation resources for use in other areas, without unfairly limiting rightful recoveries of injured persons.

The City of New York is the quintessential "deep pocket." As the Nation's largest municipality, the City of New York pays more in tort judgments than any other municipality in the country. In 1994, the City paid out some $275 million to tort plaintiffs who claimed injury by City employees. Put in perspective, that amount -- 1,000% more than the $24.2 million paid out in 1977 -- would enable the City to put over 6,000 new police officers on duty or over 7,500 teachers into

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[1] The City's huge personal injury budget exceeds the individual operating costs of no less than sixty-one of its seventy-five separate agencies.

the City's classrooms. This enormous increase in tort judgments results in a projection that the City will have to pay 2.1 billion dollars to resolve just its pending claims, more than 55,000 of them.

The number of lawsuits filed against the City is staggering: 12,000 new suits were commenced during 1995. Adding that number to the roughly 55,000 pending cases, the 67,000 total easily makes the City the most commonly sued entity in the State and, probably, in the entire nation. *See Annual Report 1995*, New York City Law Department, Office of the Corporation Counsel, p. 58.

The City is like no other litigant, for no ordinary defendant confronts liability over so broad a spectrum of activities: the City provides housing, education, child care, firefighting, sidewalks, roadways, recreational facilities, and medical services. Given that the City "owns" 6,374 miles of streets and hence nearly twice that, or approximately 12,000 total miles of sidewalk, it is not surprising that well over one-third of City tort suits arise from alleged injury resulting from cracked sidewalks, potholes, or pavement obstructions.

Moreover, studies have shown that where the defendant is a corporation, insurance company or governmental entity rather than an individual, the jury is more likely to render a large verdict. Ostrom, Rottman and Hanson, *"What are Tort Awards Really Like? The Untold Story from the State Courts"*, 14 Law and Policy, p. 77 (1992).

At any one time, there are fifty to one hundred diversity actions pending against the City in the United States District Courts for the Southern and Eastern Districts of New York. The application of the New York excessiveness standard in

these cases not only promotes New York State's interest in curbing disparate verdicts, but also will aid in the settlement of diversity actions. In order to be appropriate cases for settlement, it is critical for the defendant City to know what a sustainable verdict would be. In a diversity action, in order to assess its risk exposure, the City looks to New York state law and expects those standards to be applied. If they are not, it will greatly interfere with the City's ability to assess the case and potentially settle it for a reasonable sum.

As the lawyers for the self-insured City, having federal appellate courts review and apply the New York state standard is especially important for assessing future risk and determining budget allocations. Predictability for the City is also particularly desirable in that the office of the Corporation Counsel of the City of New York handles virtually all the myriad personal injury and property damage cases for the City in-house, with a few exceptions for certain medical malpractice cases. In addition, the Corporation Counsel also represents many public benefit corporations and authorities, including the New York City Health and Hospitals Corporation, the New York City Housing Authority, the New York City Off-Track Betting Corporation and the New York City Transit Authority.

Finally, the City and its Mayor, Rudolph W. Giuliani, have taken the lead in advocating broad tort reform both nationally and locally. *See, e.g., Annual Report 1995*, New York City Law Department, Office of the Corporation Counsel, p. 60; Statement of Rudolph W. Giuliani, Mayor of the City of New York, Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, "*The Cost to Municipalities of the Current Tort System*," May 2, 1995. These efforts, however, will be undermined if federal appellate courts cannot review damages

awards by juries in diversity actions using the same reasonableness standard that the New York State appellate courts apply pursuant to N.Y. Civ. Prac. L. & R., § 5501(c).

SUMMARY OF ARGUMENT

The standard set forth in N.Y. Civ. Prac. L. & R., § 5501(c) for determining whether a jury award is excessive is a matter of substantive state law and the Second Circuit properly determined that it should be applied in reviewing whether the award in this case was excessive. The pertinent provision of § 5501(c) was added by the State Legislature in 1986 on behalf of the citizenry of New York to curb spiralling jury awards, following a multi-year effort culminating in various recommendations for tort reform. *See generally Insuring Our Future, Report of the Governor's Advisory Commission on Liability Insurance* (April 7, 1986, chaired by former Court of Appeals Judge Hugh R. Jones). By enacting this provision, the State Legislature has determined that a plaintiff should not be permitted to recover any amount above this standard in tort. A federal court is constitutionally required to apply state law to state claims.

Further, the failure to apply this standard in diversity cases may result in the inconsistent administration of state law since the amount of recovery may turn on whether the case is brought in state or federal court.

Finally, the application of the New York standard does not require an appellate court to review findings of fact, only to apply the applicable standard to the factual record. Thus, the review of a jury award pursuant to this standard does not violate the Seventh Amendment.

ARGUMENT

THE NEW YORK STATE LEGISLATURE, IN AMENDING N.Y. CIV. PRAC. L. & R., § 5501(c), INTENDED TO LIMIT THE AMOUNT A PLAINTIFF CAN RECOVER IN TORT. UNDER *ERIE R.R. CO. V. TOMPKINS*, 304 U.S. 64, 78 (1938) AND ITS PROGENY, A FEDERAL APPELLATE COURT, SITTING IN DIVERSITY, MUST APPLY THE SUBSTANTIVE STANDARD SET FORTH IN N.Y. CIV. PRAC. L. & R., § 5501(c), WHEN REVIEWING THE EXCESSIVENESS OF A JURY AWARD.

As more fully set forth in the City's Statement of Interest, the City is the most commonly sued entity in New York State and was one of the driving forces behind the 1986 amendment to N.Y. Civ. Prac. L. & R ("CPLR"), § 5501(c). For that reason, the City will focus this brief on that provision and its application in federal diversity cases, and will not brief separately the issue whether the Seventh Amendment precludes federal appellate review of jury awards except as it specifically relates to the New York excessiveness standard. The City respectfully refers this Court to the respondent's brief for a complete exposition of the Seventh Amendment issue.

CPLR § 5501(c) was amended by Chapter 682 of the Laws of New York in 1986 to add the following provision:

> In reviewing a money judgment in an action ... in which it is contended that the award is excessive or inadequate and that a new trial should have

> been granted unless a stipulation is entered to a different award, the Appellate Division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

Prior to the 1986 amendment, there was no specific reference in the CPLR regarding an appellate court's powers to review a jury award. However, the authority of New York appellate courts to review the excessiveness of a jury verdict was well-established in common law. Under common law, the New York appellate courts were limited to the inquiry whether the award "shocked the conscience of the Court." *See, e.g., Juiditta v. Bethlehem Steel Corp.*, 75 A.D.2d 126, 428 N.Y.S.2d 535 (4th Dept., 1980); *Petosa v. City of New York, Dep't of Sanitation,* 63 A.D.2d 1016, 406 N.Y.S.2d 354 (2d Dept., 1978). Courts, however, applied this review power sparingly and, thus, appellate review did not effectively control spiralling jury verdicts. [2]

In the 1980's, New York was faced with a crisis involving spiralling tort jury awards against government as well as private entities in the state. Government entities had to devote more and more budgetary resources for payment of such awards. Additionally, spiralling awards resulted in raising insurance costs to the public. In response to this crisis, the State Legislature undertook a series of major tort reforms, including the 1986

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[2] "When Courts fail to exercise responsibility to curb excessive verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one." *Consorti, supra*, 72 F.3d at 1010.

amendment to CPLR § 5501(c) which sets forth a substantive standard for determining whether a jury award is excessive. *See,* Legislative findings and declaration, Chap. 266 of the Laws of 1986, § 1, 1986 McKinney's Sess. Laws of N.Y. p. 470 (the Legislature states that the amendment to CPLR § 5501(c) was one of the several reforms enacted "to restrain increases in medical and dental malpractice premiums and related costs"). *See, generally, Insuring Our Future, Report of the Governor's Advisory Commission on Liability Insurance* (April 7, 1986, chaired by former New York Court of Appeals Judge Hugh R. Jones).

The Legislature found that the existing "standard for appellate adjustment of damages in personal injury actions -- *i.e.,* whether the award is so excessive or inadequate as to shock the conscience of the court -- provided for insufficient review of awards and the new standard . . . [the "deviates materially" standard in CPLR § 5501(c)] will invite more careful appellate scrutiny." Legislative findings and declaration, Chap. 266 of the Laws of 1986, §1, 1986 McKinney's Sess. Laws of N.Y., p. 470.

The 1986 amendment was intended to "assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State." Governor Cuomo's Approval Memorandum of L. 1986, ch. 682, 1986 McKinney's Sess. Laws of N.Y., pp. 3182, 3184. Thus, the Legislature, in enacting the "deviates materially" standard, intended to set a limit on the recovery for torts and to bar the recovery of amounts which exceed that standard.

The Legislature's intent to set a substantive standard of allowable recovery for state-created torts in section 5501(c) is evidenced by the fact that when the Legislature amended section 5501(c), it also added a new provision, CPLR, § 5522(b).[3] That provision requires the Appellate Division, in deciding any appeal contesting an award as excessive pursuant to section 5501(c), to set forth the reasons for its decision. The Legislature envisioned that such discussion would aid courts in future cases in determining the reasonable range of permissible recovery and in time would result in a body of common law.

In addition to being a vital check against excessive jury awards, review under section 5501(c) provides guidance to parties in assessing their cases. One commentator, in discussing section 5501(c), noted that "[e]ach side must come away from settlement negotiations thinking the result, though not ideal, is essentially fair . . . Appellate decisions play a major role in helping to shape those [parties'] expectations." T. Newman, New York Appellate Practice, § 4.10 (Matthew Bender & Co., 1994). The significance of a party's ability to assess exposure should not be minimized. For example, over 90 percent of the City's tort cases are settled before verdict. *1995 Annual Report*, New York Law Department, Office

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[3] CPLR § 5522(b) provides:

> (b) In an appeal from a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate, the appellate division shall set forth in its decision the reasons therefor, including the factors it considered in complying with subdivision (c) of section fifty-five hundred one of this chapter.

of the Corporation Counsel, p. 59. Thus, the legislative provision of appellate review pursuant to § 5501(c) allows a needed measure of consistency and stability and, by reducing the incentive to litigate, serves not only the defendant, but also hastens delivery of compensation to a meritorious claimant.

The "deviates materially" standard of CPLR § 5501(c) is not a practice procedure. It was enacted to limit monetary exposure for tort claims. It was intended to shield a defendant from substantive tort recovery for any amount beyond the limit set forth in that provision. It is analogous to a statutory damage cap in that a jury award is sustainable only if it does not deviate materially from the range determined by the reviewing court to be reasonable. It differs only from a cap in that the maximum amount recoverable is not set forth by statute, but rather is determined by case law. New York's standard cannot be characterized as irrational since, as the Second Circuit stated in this case, the "object of tort damages is to do what can be done to make an injured party whole; it is not meant to be a winning lottery ticket." 66 F.3d at 429.

Petitioner's characterization of the "deviates materially" standard as a procedural provision is based on a misunderstanding of the operation of that provision in New York. Petitioner argues that the "deviates materially" standard "is used to determine the point at which the fact-finding power shifts from the jury to the Appellate Division" (Pet. Br., 19). This argument is meritless. In New York, under a separate provision of CPLR § 5501, the Appellate Division has the power to review findings of facts and law. When called upon to do

so, the Appellate Division will first determine the disputed facts and then apply the applicable law. However, where only the issue of excessiveness is raised and there is no factual dispute, such as in this case, the determination whether an award is excessive or inadequate is based upon an examination of the legal standard set forth in CPLR § 5501(c) and relevant case law. *See, e.g., Johnston v. Joyce*, 192 A.D.2d 1124, 596 N.Y.S.2d 625 (4th Dept., 1993); *Brown v. Horn*, 179 A.D.2d 1073, 578 N.Y.S.2d 951 (4th Dept., 1992); *Witmer v. Smith*, 179 A.D.2d 1026, 580 N.Y.S.2d 914 (4th Dept., 1992) (examples of cases where the Appellate Division ordered a new trial after determining, as a matter of law, that the jury award "deviate[d] materially from what would be reasonable compensation").

Moreover, the ability of a federal appellate court to apply the "deviates materially" standard in reviewing the excessiveness of a jury award, without the need to re-examine findings of fact, is demonstrated in both *Consorti* and the instant case. In both, the Second Circuit applied the standard of excessiveness furnished by state law, employing decisions of the state courts in comparable cases which indicate at what points awards become excessive. *Consorti*, 72 F.3d at 1013; *Gasperini*, 66 F.3d at 430-431. Thus, while appellate excessiveness review requires an application of the law to the factual record, it does not require a re-examination of the facts.

The State's highest court, the New York Court of Appeals, has held that the review of jury verdicts does not require a re-examination of the facts and thus, does not violate the New York State Constitution's guarantee to a

jury trial (Art. I, § 2), *see, O'Connor v. Papertsian*, 309 N.Y. 465, 473, 131 N.E.3d 883, 887 (1956), stating:

> The Appellate Division thus "properly [places] a value on the connected injuries as high as any jury would be warranted in going and [gives] the defendants the opportunity of stipulating to pay such an increased verdict in lieu of suffering a new trial." The plaintiff cannot claim that she is being deprived of her trial by jury because of the Appellate Division's action in giving her the maximum amount she would be allowed to recover by a jury verdict as a matter of law. Had she received a verdict in excess of that sum, the Appellate Division could have set it aside as excessive.
>
> In the present case the Appellate Division is not reversing a factual finding by the jury "upon the right of the parties," but is affirming their finding of liability; determining that the damages *awarded thereon were inadequate as a matter of law and announcing the limit of the damages awardable as a matter of law* (emphasis added).

Although *O'Connor* was decided prior to the 1986 amendment, it is instructive about how New York courts view the appellate courts' powers to review damage awards. *See also, Ladd v. Parkhurst*, 87 A.D.2d 971, 150 N.Y.S.2d 92 (4th Dept., 1982) (The Appellate Division stated "[i]n reviewing a jury verdict on damages an appellate court, like a trial court, may, if it determines such verdict to be inadequate *as a matter of law*, properly place a value on plaintiff's injuries equal to the maximum

amount a jury would be warranted in awarding and afford the defendant the opportunity to pay the increased amount rather than be subjected to a new trial" (emphasis added)).

The City is not suggesting that a federal court sitting in diversity should apply section 5501(c) in its entirety, including the power of the Appellate Division to make new findings of facts. The substantive legal standard of "deviates materially," however, is not dependent upon the court's powers to review facts and can be applied as a matter of law.[4]

As set forth above, the "deviates materially" standard is a substantive legal standard. The State has made a policy determination that a party should not be permitted to recover any amount beyond that standard for a state-created tort. In diversity cases where the substantive right to be enforced is created by state law, the federal court must respect the state's decision regarding the limits of recovery imposed for violations of those rights. *See*, *Felder v. Casey*, 487 U.S. 131, 133 (1988) ("federal courts are constitutionally obligated to apply state laws to state claims").

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[4] While the "deviates materially" standard is arguably less deferential to juries than the "shocks the conscience" standard, it does not violate the Seventh Amendment because, as discussed above, the Court, in applying this standard, will not be making new findings of facts.

Contrary to petitioner's suggestion (Pet. Br., p. 18), it would not be absurd for a federal court to apply the excessiveness review standard of section 5501 without also incorporating the additur provision of CPLR § 5501(c). The plaintiff chooses the forum in diversity cases and thus, should not be heard to complain that he is disadvantaged by this selective application of CPLR § 5501(c).

In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court reasoned that the determination whether state or federal law should apply must be made with reference to the policies underlying *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) -- the avoidance of inequitable administration of the laws and the discouragement of forum shopping. These policies support the application of section 5501(c) in diversity cases.

If only cases brought in state court were subject to appellate review under CPLR § 5501(c), "the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away" may "lead to a substantially different result." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). For example, in *Nowlin v. City of New York*, 182 A.D.2d 376, 582 N.Y.S.2d 669 (1st Dept., 1992), *aff'd*, 81 N.Y.2d 81, 612 N.E.2d 285, 595 N.Y.S.2d 927, *rearg. den.*, 81 N.Y.2d 1068, 619 N.E.2d 661, 601 N.Y.S.2d 586 (1993), the plaintiff, a non-resident of New York State, was injured in a vehicular accident. She sued the City of New York as well as the driver of the car in which she was a passenger. The driver was a resident of New Jersey. The plaintiff elected to commence her action in New York State court, rather than invoking diversity jurisdiction in federal court. Plaintiff prevailed on her claim, but the New York State trial court and Appellate Division significantly reduced the personal injury award as excessive.

If the *Nowlin* plaintiff, however, had commenced a diversity action in federal court, and section 5501(c) were not applicable, she might have recovered more than the amount considered reasonable by New York. The permissible recovery for a state-created tort should not be

dependent upon whether the case is brought in state or federal court. Otherwise, the important purposes underlying the enactment of the New York excessiveness standard -- "to assure greater scrutiny of the amounts of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the state" -- would be greatly undermined. *See*, Governor Cuomo's Approval Memorandum of L. 1986, ch. 682, 1986 McKinney's Sess. Laws of N.Y., pp. 3182, 3184.

The prospect that recovery for a state-created tort could turn on the forum chosen by a plaintiff invites variability of jury awards for similar injuries within the state. Such a result "undermines the legal system's claim that like cases will be treated alike . . . [It also] makes it harder to settle cases, thus adding unnecessary transaction costs to the tort system." Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995).

Additionally, if the application of section 5501(c) turned on whether a plaintiff has chosen to commence suit in state or federal court, forum shopping may be encouraged. Some commentators have noted that "'[t]he only groups who still argue strongly for diversity jurisdiction are the Association of Trial Lawyers of America, whose members specialize in personal injury litigation, and corporate lawyers whose clients prefer the federal courts." C. Wright, Law of Federal Courts, § 23, p. 152, footnote 54 (5th ed. 1994) (quoting Sheran & Issacman, *State Cases Belong in State Courts*, 12 Creighton L. Rev. 1 (1978)). In choosing the forum, a plaintiff clearly will, as he or she has a right to, consider

the tactical advantages of each forum. The permissible amount of recovery, however, is unlike rules of discovery and other court practices. It would be unfair to expose a defendant to liability beyond the limits set by the state simply because there is a diversity of citizenship.

In sum, New York has determined that recovery in tort should be barred for any amount which "deviates materially from what would be reasonable compensation". CPLR § 5501(c). This is a matter of substantive state law and represents the codification of important state policies. Thus, the Second Circuit properly determined that CPLR § 5501(c) should be applied in determining whether the jury award in this case was excessive.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

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